Supreme Court, U. S.
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80-548

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,
vs.

HERMAN RANDLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF THE

STATE OF MICHIGAN

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QUESTION PRESENTED

IS EVIDENCE OF OR COMMENT UPON THE DEFENDANT'S REFUSAL TO PROVIDE NON-TESTIMONIAL INFORMATION VIOLATIVE OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION?

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Now comes William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Edward R. Wilson, Principal Attorney, Appeals, and Timothy C. Scallen, Assistant Prosecuting Attorney, and prays that a writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Michigan entered in the above-entitled cause on April 29, 1980, leave to appeal denied by the Michigan Supreme Court on July 23, 1980.

OPINIONS BELOW

The Opinion of the Michigan Court of Appeals, issued April 29, 1980, is unreported and appended as Appendix A. The Michigan Supreme Court denied leave to appeal in an order issued July 23, 1980 and appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was issued on April 29, 1980. The Michigan Supreme Court denied Petitioner's application for leave to appeal on July 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

List of Parties to the Proceeding

Herman Randle, Respondent
Represented below by appointed counsel,
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CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or

> naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

Respondent was tried by jury and convicted on the charge of murder in the second-degree. In his opening statement defense counsel stated that after the incident the respondent left the scene, explaining he did not leave town but went over to his mother's house. He further stated that the respondent told everyone where he would be when he left the scene and that is where the police came and arrested him. (R. I, 83).

The arresting officer testified that after receiving information and a description of the respondent at the scene he proceeded to a certain apartment where he

found the respondent with others. The officer asked the respondent if he was Herman Randle to which the respondent answered with another name. The officer testified that after placing him under arrest, the respondent never admitted to him that he was in fact Herman Randle. (R. II, 36-37).

The Michigan Court of Appeals held, relying upon the holding of People v Bobo, 390 Mich 355 (1973) which was premised upon the Fifth Amendment, that testimony by the arresting officer that respondent gave a false name before his arrest and then refused to give a name after he was arrested violated the respondent's constitutional right to remain silent.

REASONS FOR GRANTING THE WRIT

The issue as to whether evidence of or comment upon a defendant's refusal to provide non-testimonial information violates the Fifth Amendment is an issue which has split several of the federal circuits, several state courts of last resort, consequently has caused a split between federal circuits and state courts and which has once before been before this Court (though the question was not reached). Schmerber v California, 384 US 755, 765 n. 9, 86 S Ct 1826, 1833 n. 9, 16 L Ed 2d 908 (1966).

The Second Circuit has held that such evidence does not violate the Fifth Amendment. In Welch v District Court of Vermont Unit, Ect., 594 F 2d 903 (CA 2, 1979), the defendant appealed from a denial of a petition for writ of habeas corpus on the claim that the admission into evidence of his refusal to take a breath test at his trial on the charge of driving while intoxicated violated his privilege against self-incrimination. In finding this contention to be of no merit, the Court held:

This issue was raised in Schmerber but the Court did not resolve it because defense counsel in that case had failed to object at trial to the admission of the refusal evidence or the prosecutor's comments on that evidence. 384 U.S. at 765 n.9, 86 S.Ct. 1826, 1833 n.9. The Court did note that "general Fifth Amendment principles, rather than the particular holding of Griffin [v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)], would be applicable in these circumstances." Id., citing Miranda v. Arizona, 384 U.S. 436, 468, n.37, 86 S.Ct. 1602, 16 L.Ed2d 694 (1966). The Supreme Court also held that the State "may have to forgo the advantage of any testimonial products of administering the test," such as incriminating statements or confessions made by the accused out of fear of the process of extracting physical evidence from his body or out of religious opposition to the test. 384 U.S. at 765 n.9, 86 S.Ct. at 1833 n.9 (emphasis in original).

There is no claim in this case that Welch refused out of fear of any "pain, danger, or severity" associated with the breath test, id., or that he opposed the test on religious grounds. Nor did he "confess" when faced with the threat of a compelled test. Although the evidence introduced constituted more than a mere "No" on the part of Welch, and included not only vague and contradictory answers but also a request for the presence of a third party witness if he should submit to the test, he did not give a reason for his refusal or actually make an incriminating statement to the effect that he was drunk. His only claim, therefore, is that the very act of refusal was itself testimonial in nature.

> We have already rejected a similar claim in the area of handwriting exemplars, holding in United States v. Wolfish, 525 F.2d 457, 461 (2d Cir. 1975) (per curiam), cert, denied, 423 U.S. 1059, 96 S. Ct. 794, 46 L. Ed.2d 649 (1976), that it was not error to admit evidence of the defendant's refusal to cooperate in giving a handwriting exemplar, including his efforts to disguise his handwriting in the exemplar.

Consistent with this view, see also United States v Blakney, 581 F2d 1389 (CA 10, 1978), United States v Nix, 465 F2d 90 (CA 5, 1970), Clark v State, 379 So 2d 97 (Fla., 1979), Hill v State, 366 So 2d 318 (Ala., 1979), People v Thomas, 385 NE 2d 584 (N.Y., 1978) and City of Westerville v Cunningham, 239 NE 2d 40 (Ohio, 1968) all of which opinions are primarily based upon Schmerber, supra. Many federal circuit and state courts, however, take or indicate a sharply opposing view. Leake v Cox, 432 F2d 982 (CA 4, 1970) (assumed without deciding such evidence was inadmissable citing Schmerber, 384 US 755, 765 n. 9, 86 S Ct 1826, 1833 n.9, 16 L Ed 2d 908 (1966), United States v White, 355 F2d 909 (CA 7, 1966), State v Andrews, 212 NW 2d 863 (Minn., 1973), State v Adams, 247 SE 2d 475 (W. Va., 1978), Dudley v State, 548 SW2d 706 (Tex., 1977) and State v Oswald, 241 NW 2d 566 (S.C., 1976) (indicating agreement with Andrews but not having to go that far). The holding of the Supreme Court of Minnesota in Andrews, supra is in direct conflict, both factually and legally, with that of the Second Circuit in Welch, supra.

Additionally, the Ninth and Seventh Circuits are split as to whether Miranda warnings are required before admitting evidence of voice or handwriting exemplars. United States v Thomas, 586 F2d 123 (CA 9, 1978) and United States v Cassell, 452 F2d 533 (CA 7, 1971).

It is patently clear that divulgence of one's name, like voice exemplars and the like, is not a testimonial communication protected by the Fifth Amendment. United States v Prewitt, 553 F2d 1082 (CA 7, 1977) (alias), People v Davis, 17 Mich App 615 (1969). The Michigan Court of Appeals in the instant case, in holding that evidence of the respondent giving a wrong name and his subsequent refusal to divulge his true name or remaining silent on that as violative of his Fifth Amendment privilege against self-incrimination, subscribed to the view of White, Andrews and others that evidence of the respondents refusal to provide non-testimonial information violates the Fifth Amendment.

There is unquestionably a split between and among federal circuit and state courts and seemingly divergent opinions as to the significance of this Court's statement in footnote 9 in Schmerber. However, petitioner submits that the view that evidence of refusing to provide non-testimonial information violates one's Fifth Amendment rights is a wholly unwarranted application and extension of the Fifth Amendment. The Court has consistently and squarely defined the Fifth Amendment privilege as protecting "an accused only from being compelled to testify against himself or otherwise provide the State with evidence of testimonial or communicative nature . . ." Schmerber, 36 S Ct 1830. Evidence or comment upon the defendant's refusal to provide non-testimonial information, which he had no right to do, does not in any manner violate his privilege against incriminating himself or provide the State with testimonial evidence. To hold otherwise, especially here where the defendant claimed in his opening statement that he made himself readily available to the police at all times, would serve no useful purpose and would be purely a fanciful and unwarranted application of the Fifth Amendment privilege against self-incrimination.

There being a split between and among federal circuit and state courts as to the scope and application of the Fifth Amendment, petitioner submits that plenary review by this Court is needed.

CONCLUSION

It is respectfully submitted that for the reasons outlined above plenary review should be granted.

Respectfully sutmitted,

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TCS/do

Dated: September 18, 1980.

APPENDIX A

OPINION OF THE MICHIGAN COURT OF APPEALS,

(People of the State of Michigan v Herman Randle)

(No. 43317)

Before: N.J. Kaufman, P.J., D.E. Holbrook, Jr. and R.M. Maher, JJ.

PER CURIAM

The defendant, Herman Randle, was convicted of second-degree murder in violation of MCL 750.317; MSA 28.549 in a jury trial in the Recorder's Court for the City of Detroit that lasted from July 25 through July 28, 1978. Defendant was sentenced to serve the rest of his natural life in prison. The defendant appeals as of right, raising five challenges to his conviction. This Court need only address one challenge since we find that challenge dispositive of the present appeal.

The prosecution's case against the defendant was based upon eyewitness testimony of several witnesses who observed the defendant severely beat the deceased, Delores Butler. The defendant and the deceased had apparently been living as man and wife for several years. The cause of the deceased's death was established to be a torn liver and mesentery. Prosecution witnesses testified that the defendant had beaten the deceased, thrown her down a flight of stairs, and kicked the deceased in the abdomen. The defendant testified in his own behalf and admitted to having hit the deceased about the face after learning of the deceased's infidelity. However, the defendant denied ever kicking the deceased and claimed that she had fallen down a flight of stairs due to her intoxication.

While examining a police officer who had arrested the defendant after this incident, the prosecutor asked the officer if the defendant had given the officer his correct name after he had been arrested. The officer stated that before his arrest, the defendant had given a false name and that after his arrest, the defendant still did not give his correct name, but remained silent on this issue. We view this as improper examination invading the defendant's self-incrimination rights as established by People v Bobo, 390 Mich 355 (1973). In Bobo, the Supreme Court held:

"We will not condone conduct which directly or indirectly restricts the exercise of the constitutional right to remain silent in the face of accusation. 'Non-utterances' are not statements. The fact that a witness did not make a statement may be shown only to contradict his assertion that he did."

See also, People v Hoye, 80 Mich App 258, 262; 263 NW2d 343 (1977) and People v Perez, 66 Mich App 685; 239 NW2d 432 (1976).

Defense counsel's failure to object does not preclude appellate review. People v Dunn, 46 Mich App 226; 208 NW2d 239 (1973), People v Gant, 55 Mich App 510; 222 NW2d 784 (1974), People v Hargrave, 74 Mich App 690; 254 NW2d 614 (1977).

In Hargrave and Hoye, supra, this Court found prosecutorial cross-examination and/or argument concerning defendant's silence to be "offensive to the maintenance of a sound judicial process". We find this to be true of the direct examination of the arresting police officer in the case at bar. To allow the prosecutor to use the silence of the accused against him placed an impermissible penalty upon the exercise of the defendant's privilege against self-incrimination. We also find the people's proofs were not so overwhelming to offset the prejudicial effect of this testimony. Though unobjected to at trial, the error could not have been cured by a cautionary instruction and therefore constitutes grounds for reversal. We wish to reiterate a warning given by this Court several years ago:

"In finding the error harmless in this case, we wish to emphasize that we do not condone conduct which directly or indirectly restricts or penalizes the exercise of the constitutional right to remain silent in the face of accusation. People v Bobo, 390 Mich 355; 212 NW2d 190 (1973). We will find it difficult in the future to believe that prosecutors and police are ignorant of the well-established principle of law which forbids comment upon an accused's silence or that clear violations of the principle arise from inadvertence. Deliberate violations of this rule may lead us to reverse convictions even where evidence might be overwhelming. The prosecutor who comments, or elicits comment, on a defendant's silence thus risks the loss of a perfectly good case for no reason."

For the above reason, the defendant's conviction is vacated and the case is remanded to the lower court for a new trial.

APPENDIX B

ORDER OF THE MIICHIGAN SUPREME COURT

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 23rd day of July in the year of our Lord one thousand nine hundred and eighty.

Present: The Honorable Mary S. Coleman, Chief Justice, Thomas Giles Kavanagh, G. Mennen Williams, Charles L. Levin, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the question presented should be reviewed by this Court.

State of Michigan — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 23rd day of July in the year of our Lord one thousand nine hunderd and eighty.

/s/ Corbin Davis
Deputy Clerk